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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 346

FAIR SHARE ORGANIZATION, INC.,
Petitioner,

vs.

MORRIS MITNICK, D/B/A CENTRAL FOURTH STREET DRUGS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

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THE WINTHROP WARREN PRINTING COMPANY, INC., N.Y.C.

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CITATIONS TO OPINIONS BELOW.

Respondent accepts Petitioner's statement of opinions below and the grounds for invoking jurisdiction of this Court for Writ of Certiorari to the Supreme Court of the State of Indiana.

QUESTION PRESENTED.

Respondent respectfully submits that Petitioner's statement of the question presented is not completely accurate. He believes that the question here is as follows: Does the Fourteenth Amendment bar the State of Indiana from the

of injunction to prohibit Petitioner from picketing Respondent's place of business solely to secure compliance with Petitioner's demand that Respondent discharge a white clerk and hire a negro in his stead, without regard to qualifications of either, when such demand would be in violation of the public policy of the State of Indiana as expressed in its Fair Employment Practices Act of 1961.

STATUTES INVOLVED

In addition to statutory provision set forth in Petitioner's Brief, page 3 and printed in Appendix D thereof, pages 15A-17A, there is also involved Indiana's Fair Employment Practices Act, Section 40-2308 *et seq.* (Burns' Ind. Stat. Anno., 1952 Repl. (Supp.)); printed in Appendix A hereof, *infra*, page ".

STATEMENT OF FACTS

The Petitioner's statement of facts is not a fair statement of the facts upon which the trial and appellate courts founded their decisions. Petitioner has attempted in its statement to assert as facts evidence given on the trial, which, from a perusal of the Special Findings of Facts of the trial court, indicate that such evidence was not believed by the trier of the facts. It is attempting again, against every principle of appellate jurisprudence, to have the appellate tribunal, including this, weigh the evidence and determine the credibility of the testimony given on the trial by the various witnesses.

Respondent respectfully submits that a fair statement of the facts which sustain the decisions of the trial and appellate courts of Indiana, are as follows:

That the Fair Share Organization, Inc., a non-profit corporation, was organized for the following purposes: to

awaken the Negro politically, economically, socially and civilly; to educate the Negro to vote intelligently and to foster and promote qualified candidates for position irrespective of their party affiliation; to educate the Negro not to spend money where he cannot work; to cooperate wholeheartedly with every other organization which is working for the alleviation of race discrimination; and to employ all legal means necessary to accomplish these purposes.

That the parent organization and main office was maintained in the City of Gary, County of Lake and State of Indiana.

That it organized a chapter in the city of Michigan City as an offspring of the main corporate body and appointed as its agents, Arthur Simpson, independent chairman (Tr. p. 160), Leon Coleman, Jr., Republican chairman, and Delmar Worlds, Democratic chairman (Tr. p. 163), on September 21, 1961.

That on September 27, 1961, Petitioner, through these officers, made demand upon the Respondent to employ a Negro as a clerk in his drug store, even if Respondent had to discharge a white clerk to do so. Petitioner offered no specific person for such employment. Respondent, at the time the demand was made, had no opening for a clerk. He therefore refused Petitioner's demand. No member of the Negro race had ever applied for employment as a clerk prior to the time of the demand by Petitioner and no Negro has applied for a position as a clerk since that time. At the time the initial demand was made upon Respondent, Respondent offered to hire a Negro pharmacist if they would produce one. Petitioner's officers refused Respondent's offer.

Subsequent to this activity, Petitioner picketed Respondent's place of business. While the picketing was in progress, Arthur Simpson, the alleged independent chairman

of Petitioner organization, accosted Respondent in the presence of two Negro newspaper reporters for the purpose of negotiating the dispute with Respondent. Respondent offered to negotiate if he could have a newspaper reporter from the Michigan City News-Dispatch present during the discussion, which offer was refused. The picketing continued with from two to seven pickets being used from time to time. The pickets carried signs which were removed from the interior of a truck owned by Petitioner and which truck bore Petitioner's name on its sides. The picketing so affected Respondent's business, that he sustained a loss therefrom.

HOW FEDERAL QUESTION IS PRESENTED.

Respondent concedes that Petitioner attempted at various stages of the proceedings herein to invoke the protection of the Fourteenth Amendment to the Constitution of the United States but submits that there is no federal question involved herein.

REASONS FOR DENYING THE WRIT.

A.

(Addressed to Proposition "A", Petitioner's Brief, p. 8.)

Respondent concedes Petitioner's proposal stated under "A" on Page 8 of its brief.

B 1.

(Addressed to Proposition "B 1", Petitioner's Brief, p. 10.)

Petitioner asserts that the decisions of the Indiana Appellate and Supreme Courts, which are based upon and follow the case of this Court in *Hughes v. Superior Court*

(1950), 339 U. S. 460, 70 S. Ct. 718, 94 L. ed. 985, are in conflict with the decisions of this Court in *New Negro Alliance et al. v. Sanitary Grocery Company, Inc.* (1938), 303 U. S. 552. Respondent respectfully submits that there was no conflict between these decisions. Petitioner misconstrues the decision of this Court in *New Negro Alliance et al. v. Sanitary Grocery Company, Inc.* The only matter decided by this Court therein was one of jurisdiction of the federal courts to issue injunctions to restrain a Negro organization which demanded of Sanitary Grocery Company, Inc., that it change its hiring practices so as to include Negroes among its employees. In the light of the Norris-LaGuardia Act, which specifically deprived the federal courts jurisdiction from issuing injunctions in cases involving labor disputes, this Court merely stated that a group of Negroes who united for the purpose of obtaining recognition for employment came within the purview of the definition contained in the Norris-LaGuardia Act as a "labor dispute"- nothing more. This Court made no attempt nor is there any apparent evidence from the opinion that the question of the lawfulness or unlawfulness of the demand was considered or raised.

In the instant case, which is bottomed on the *Hughes v. Superior Court, supra*, the Indiana Appellate Court, and affirmed by the Supreme Court of Indiana, has reaffirmed a principle of Indiana law that even where there is a labor dispute as defined in Indiana's "Little Norris-LaGuardia Act", if the purpose of the picketing is unlawful, the Indiana Anti-Injunction Statute does not deprive an Indiana court of power to issue an injunction to restrain such acts.

It will be noted that Petitioner has studiously avoided mentioning in its brief the existence of the Indiana Fair Employment Practices Act, Section 40-2308 *et seq.* (Burns' Ind. Stat. Anno. 1952 Repl. (Supp.)), which clearly enun-

ciates the public policy of the State of Indiana that no person shall be denied employment because of his race, creed or color. Clearly in this case and on the record herein, Petitioner has taken the position that Respondent must hire a Negro because of the color of his skin, not because of any qualifications. Respondent submits that this demand of Petitioner is just as discriminatory as the situation where a person is denied employment because of the color of his skin, his religion or his ethnic background.

Petitioner further asserts that where there is a total lack of evidence to support a court's decision, a court of appeal has the responsibility of examining the record and reversing the decision and cites a number of decisions of this Court to that effect on Page 11 of its brief. Respondent has no argument with this sound principle of law. However, it will be noted that, in raising this question, Petitioner is asking this Court to review the evidence and determine the credibility of the witnesses. This is not supported by the cases of this Court cited by Petitioner at Page 11 of its brief.

On the question of whether or not there was any evidence to support the Special Findings of Fact that the purpose of the picketing was illegal, *i.e.*, demanding that Respondent fire a white clerk and hire a Negro in his stead, the following is an extract of the evidence of the Respondent, Morris Mitnick, and Delmar Worlds, given on the trial of this cause:

> "A. They asked me if I would employ a Negro in my store. I said yes, I would, that as a matter of fact I was in need of a pharmacist and I would employ a Negro pharmacist, that if they would get me one I would employ him immediately that same afternoon. And they said a Negro pharmacist has dignity, and they were not concerned about that. They wanted a clerk in my store. I says, well, I didn't need a clerk. They said, 'Well, we want a clerk in your store.' I

said, 'I still don't understand. You are making a demand you want a clerk. I don't need a clerk, Negro or white. I need a pharmacist.' They said, 'Well, fire a white one and hire a Negro.' And then we stopped the conversation." (Tr., p. 65, l. 17 to l. 30.)

"Q. Now, Mr. Mitnick, who was carrying on this conversation?

"A. Mr. Coleman was carrying on most of the conversation.

"Q. Do you know who made the statement, 'Fire a white clerk and hire a Negro'?

"A. Mr. Coleman did.

"Q. What further conversation was had at that time?

"A. Mr. Coleman told me I did 95 percent of my business, approximately, with the Negroes, and therefore I should employ a Negro, even if I had to fire a white man. I asked him where he got the information. He says, 'Oh, we know all about it. We know you do 95 percent of your business with Negroes.' How he got that, I don't know.

"Q. What further conversation was had, if any?

"A. By that time, I guess I got a little sore, and told them inasmuch as 85 percent of my business, approximately, was with whites and about 15 percent with Negroes, that I could get along without the Negro business but I could not get along without the white, and I cannot fire a white clerk to hire a Negro any more than fire a Negro and hire a white." (Tr., p. 66, l. 1 to l. 23.)

"*Direct Examination.* DELMAR P. WOODS, a witness for Appellant:

"Q. What, if anything, did Mr. Mitnick say to that?

"A. Mr. Mitnick said that he has nothing against hiring Negroes; he would hire a pharmacist now. And at this time Mr. Coleman asked him if he would put this in writing, and he said no. I asked Mr. Mitnick would he hire a clerk, and Mr. Mitnick replied he did not need a clerk." (Tr., p. 234, l. 18 to l. 22.)

Respondent respectfully submits that the decision of the Indiana Appellate and Supreme Courts is in full conformity with the opinion of this Court as expressed by Justice Frankfurter in *Hughes v. Supreme Court*, *supra*, as follows:

> "... the due process clause of the fourteenth amendment of the Constitution of the United States does not preclude California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert that policy."

B 2.

(Addressed to Proposition "B 2", Petitioner's Brief, Page 11.)

Petitioner asserts the decision of the Indiana courts in the instant case is erroneous and in conflict with *Karges Furniture Company v. Amalgamated Woodworkers' Local Union No. 131* (1905), 165 Ind. 421, 75 N. E. 877. A complete discussion of this case would unduly prolong this brief and serve no purpose. Respondent would observe, however, that if there is any conflict between the instant case and *Karges Furniture Company v. Amalgamated Woodworkers' Local Union No. 131* (*supra*), it is the prerogative of the Indiana courts, if they so desire, to overrule any of their decisions. Petitioner has failed to show how a federal question is raised by their proposition.

B 3.

(Addressed to Proposition "B 3", Petitioner's Brief, Page 12.)

Respondent does not in any way question Petitioner's right of free speech and assembly, nor have any of the courts of the State of Indiana in any way denied it such

prerogatives, so long as Petitioner exercises its rights of free speech and assembly without doing violence to the public policy and law of the State of Indiana, as enunciated in Indiana's Fair Employment Practices Act. It cannot, under the cloak and guise of civil rights assert or demand greater rights than any other citizen or person of the United States. For the foregoing reasons, Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

RAYMOND M. FOX, JR.,
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Attorneys for Respondent.

APPENDIX A.

BURNS' INDIANA STATUTES, 1952 Repl., Vol. 8, Fair Employment Practices Act, Sec. 40-2308:

"It is the public policy of the state of Indiana to encourage all of its citizens to engage in gainful employment and to encourage the full utilization of the productive resources of the state to the benefit of the state, the family and to all the people of the state.

"The practice of denying employment to, and discriminating in employment against, properly qualified persons by reason of the race, creed, color, national origin or ancestry of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of this state. The promotion of equal opportunity in employment without regard to race, creed, color, national origin or ancestry through reasonable methods that do not create that which it seeks to enjoin is the objectives and purposes of this act."